CASE NO: 89-1008

IN THE

SUPREME COURT OF THE
UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs.

HELEN OWEN

Respondent

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

The sole question under review herein is whether or not the Petitioner has set forth a proper basis under 28 U.S.C. Section 1254(1) upon which this court may exercise its discretionary authority to issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT PURSUANT TO RULE 28.1

Dwight H. Owen is an individual Petitioner.

Helen Owen is an individual Respondent.

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* All references in Respondent's brief to an Appendix are to the Appendix submitted by Petitioner

TABLE OF AUTHORITIES

OPINIONS BELOW

The July 11, 1989, opinion of the United States Court of Appeals for the Eleventh Circuit, whose judgment the Petitioner seeks to have reviewed, is reported at 877 F.2d 44 (11th Cir. 1989) and is reprinted in the Appendix at A1. The prior opinion of the United States District Court for the Middle District of Florida, entered on June 7, 1988, is reported at 86 B.R. 691 (M.D. Fla. 1988), and is reprinted in the Appendix at A11. The prior opinion of the United States Bankruptcy Court for the Middle District of Florida, entered on February 8, 1988, was unreported and is reprinted in the Appendix at A21.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on the 11th day of July, 1989, and affirmed the decision of the United States District Court for the Middle District of Florida. (A1). A timely filed Petition for Rehearing and Suggestion for Rehearing In Banc were denied on the 31st day of August, 1989 (A25). The Petitioner alleges jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Title 11, United States Code Section 522(b), 522(f), reproduced at (A30-22).

Section 222.20, Florida Statutes (1985), reproduced at (A36).

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW.

Debtor filed a petition under Chapter 7 of Title 11 of the U.S. Code on January 13, 1986. Debtor was granted a discharge on May 13, 1986. Debtor filed an application to reopen this case on December 15, 1986. An order was entered reopening the case to allow the Debtor to pursue a lien avoidance action pursuant to 11 U.S.C. Section 522(f)(1) on April 20, 1987. Debtor filed a Motion to Avoid Lien on April 13, 1987. Creditor filed a response to Debtor's Motion to Avoid Judgment Lien on April 30, 1987. The Bankruptcy Court granted Debtor's Motion to Avoid Judgment Lien in its Order on Motion to Avoid Judgment

Lien dated December 1, 1987. Creditor filed a Motion to Amend or Make Additional Findings of Fact Pursuant to [Bankruptcy] Rule 7052(b) and to Alter or Amend the order on Motion to Avoid Judgment Lien Pursuant to [Bankruptcy] Rule 9023 on December 7, 1987. The Bankruptcy Court reversed its decision by finding that the judgment lien sought to be voided was not the type included within the ambit of 11 U.S.C. Section 522(f)(1), and accordingly, denied Debtor's Motion to Avoid Judgment Lien in its order on Motion to Amend or Make Additional Findings of Fact Pursuant to [Bankruptcy] Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to [Bankruptcy]

Rule 9023, dated February 8, 1988. Debtor filed his Notice of Appeal to the district court on February 16, 1988.

The district court affirmed the judgment of the bankruptcy court. A judgment in a civil case was thereafter entered on June 7, 1988, reflecting the district court's decision. Debtor filed a Notice of Appeal on June 21, 1988 to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the district court. The Debtor filed a timely Petition for Writ of Certiorari on November 28, 1989.

II. THE FACTS.

The Respondent obtained a money judgment against the Petitioner in Circuit Court, Manatee County, Florida,

in December 1975. A certified copy of that judgment was recorded in the Public Records of Sarasota County, Florida, on July 29, 1976. At that time, Petitioner owned no property in Sarasota County.

On November 27, 1984, Petitioner acquired record fee ownership of the real property at issue herein, Unit 304 of Embassy House, a condominium, located in Sarasota County. At that time, Petitioner was a single man and not "the head of a family" as was then required for entitlement to the Florida Constitutional homestead exemption. Article 10, Section 4, Fla. Const.

On November 6, 1984, the citizens of Florida approved an amendment to the constitutional homestead provision which

substituted "a natural person" for the previously required "head of a family." (A33). That amendment became effective on January 8, 1985. Article 11, Section 5(c), Fla. Const. (A34).

On January 13, 1986, the Petitioner filed his Chapter 7 bankruptcy petition and claimed the above property as exempt as his homestead on his B-4 schedule, in accordance with Chapter 222.20, Florida Statutes (1985) (A36), the provision which limits Florida debtors to state, rather than federal, exemptions in bankruptcy. The Bankruptcy Court allowed this exemption for purposes of general administration of the estate.

In due course, the Petitioner received his bankruptcy discharge.

Thereafter, the court permitted the case to be reopened, at Petitioner's request, for the purpose of filing a Motion to Avoid Respondent's Lien pursuant to 11 U.S.C. Section 522(f). The order of February 8, 1988 (A21) in which the Bankruptcy Court held the lien to be unavoidable is the order appealed to the district court and subsequently to the court of appeals. The district court (A11) and court of appeals (A1) both affirmed the bankruptcy court.

III. ARGUMENT.

The lien sought to be avoided under 11 U.S.C. Section 522(f) by Petitioner/Creditor below is based upon a judgment which was obtained some ten years prior to the filing of a

bankruptcy petition. The judicial lien was not exempt under the Bankruptcy Code until after the judgment lien attached to the real property in question at the time the creditor purchased it. It did not become exempt until after an amendment to the Florida Constitution changing homestead exemption entitlements. Even then, under Florida case law, the exemption was subject to the prior existing judicial lien.

No case cited by Petitioner in support of his suggestion that there is a conflict among the courts of appeal deals with a factual case in which a long standing judicial lien preexists the status of exemption. Each of these court of appeals cases which are cited

by Petitioner deal with property which was exempt and liens which were imposed upon the exempt property by consent.

An examination of congressional intent regarding the applicability of 11 U.S.C. Section 522(f) confirms that it was never intended to allow avoidability except where its application would allow the creditor to enjoy an exemption. In the case below, the exemption only existed subject to a long standing prior lien.

REASONS FOR DENYING WRIT

None of the courts of appeals have dealt with the precise issue presented to the Court below. Consequently, there is no conflict between or among any of the circuits.

The setting of this case arises out of a statutory scheme of property exemptions of which debtors in bankruptcy can avail themselves. Upon the filing of a petition in bankruptcy, all of the Debtor's legal and equitable interests in property, with few exceptions not relevant here, become property of the estate. After the property comes into the estate, the debtor is allowed to exempt certain items under 11 U.S.C. Section 522(b). Congress specified the kinds and amount of property that may be exempted in 11 U.S.C. Section 522(d). In addition, Debtors may retain property defined

as exempt by other federal laws. 11 U.S.C. Section 522(b)(2)(A). Once the property is removed from the estate, the debtor may use it as his own. Liens valid in bankruptcy that cover exempt property, however, are preserved, and creditors holding such liens may enforce them against exempt property. 11 U.S.C. Section 522(c)(2). Title 11 U.S.C. Section 522(f), however, permits a Debtor to avoid certain kinds of liens encumbering particular kinds of property to the extent that the lien impairs an exemption. The Bankruptcy Code permits states to "opt-out" of the federal list of exemptions described in 11 U.S.C. Section 522(d), making them inapplicable

to their residents who file petitions for relief under the bankruptcy laws. 11 U.S.C. Section 522(b)(1)[1].

The Petitioner's argument is that the trial court should have allowed him to apply 11 U.S.C. Section 522(f) and avoid the lien and that the courts of

1. Section 522(b) provides in part:

***

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

***

(1) Property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative, (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 day immediately preceding the date of the filing of the petition, or for a longer portion of such 180 day period than in any other place;...

***

appeals for the Second[2], Fourth[3], Eighth[4], Tenth[5], and Eleventh[6] Circuits would have so found and that the courts of appeals for the Fifth[7] and Sixth[8] Circuits are in conflict with those circuits and support the ruling below that the Petitioner seeks this Court's jurisdiction to appeal from.

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2. In Re Brown, 734 F.2d 119 (2d Cir. 1984)
3. Dominion Bank of the Cumberlands, NA v. Nuckolls, 780 F.2d 408 (4th Cir. 1985)
4 In Re Thompson, 750 F.2d 628 (8th Cir. 1984)
5. In Re Leonard, 866 F.2d 335 (10th Cir. 1989)
6. In Re Hall, 752 F.2d 582 (11th Cir. 1985)
7. In Re McManus, 681 F.2d 353 (5th Cir. 1982)
8. In Re Pine, 717 F.2d 281 (6th Cir. 1983) cert. den. 466 U.S. 928, 104 S.Ct. 711, 80 L.Ed. 2d 183 (1984)

Therein, argues the Petitioner, lies the conflict upon which this Court should grant a Writ of Certiorari.

Petitioner offers no satisfactory explanation as to why the Eleventh Circuit in In Re Hall, 752 F.2d at 582, is aligned with the majority of Circuits which he claims would support his position and then renders the opinion in the case below which he argues as being aligned with the Fifth and Sixth Circuits.

The key to that apparent anomaly lies in the unique factual scenario of the instant case which differentiates it from all seven of the cases cited by Petitioner in his effort to show the existence of a conflict. The

Respondent/Creditor below obtained a final judgment against the Debtor on December 1, 1975, and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976. In November, 1984, the Debtor purchased certain real property in Sarasota County, Florida, and immediately upon acquiring the property the judgment of Creditor became a lien on the property. At the time the Debtor acquired the property and the judgment lien attached, the Debtor was not entitled to claim the property under the existing homestead exemption provision because he was not a "head of a family" as was required under the Florida Constitution. On November 6, 1984, an amendment to Article X, Section

4 was adopted by the citizens of Florida which substituted "a natural person" for "a head of a family." That amendment became effective on January 8, 1985. On January 13, 1986, Debtor filed his petition under Chapter 7, Title 11, of the United States Bankrutpcy Code, listing the condominium property as exempt as his household.

In short, the creditor's judgment was procured approximately one decade prior to Debtor seeking relief in bankruptcy; nearly eight years prior to the Debtor acquiring the subject property and over two months prior to the time the property became exempt.

These facts differ materially from each of the seven cases cited by

Petitioner in that in each of those cases the Debtor enjoyed an exemption in the property at the center of controversy prior to the time that the lien attached. Petitioner admits in his brief that his exempt status arose subsequent to the lien (Petition for Writ of Certiorari, page 5). The courts of appeals cases he relies upon to suggest a conflict do not address this issue.

This difference was an obviously crucial one in the rationale of the court below. At the conclusion of an

analysis of the Congressional intent[9] of 11 U.S.C. Section 522(f), it was the lower court's opinion that the facts of this case did not come within the penumbra of the intended scope of 11 U.S.C. Section 522(f) for the reason that: "The Debtor never held this property exempt from this judicial lien."

The most important factor, however, is that Petitioner has failed to

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9. The lower court opined that the legislative history of Section 522(f) indicates that Congress sought to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy. In order for the debtor to have a fresh start, this provision enabled liens to be removed from certain exempt property. Owen, 877 F.2d 47 and A9.

recognize this material difference of fact and has failed to set forth any, much less any convincing, argument which would explain why any of the courts of appeals for the circuits relied upon by the Petitioner would not reach the same result given the same set of facts considered by the case below.

Petitioner argues that one group of the conflicting circuits hold that federal law governs the applicability of 11 U.S.C. Section 522(f) and one group holds that state authority under 11 U.S.C. Section 522(b) to enact exclusive exemption plans includes the option to exclude encumbered property.

An analysis of the Sixth and Fifth Circuits rationales and holdings, though

admittedly speculative in that in addition to the factual difference, they were considering the import of state statutes specifically enacted under the "opt-out" authority of 11 U.S.C. Section 522(b)(2) rather than a state constitutional provision defining the very essence of an exemption, compels the conclusion that they are not inconsistent with the the lower court's decision: "...The Debtors may avoid liens only on that property which the states have declared to be exempt." In Re Pine, 717 F.2d at 284, citing McManus, 681 F.2d at 353, with approval. In Re Hall, 752 F.2d at 582, is

representative of the grouping of circuits, the decisions of which Petitioner advocates as being well reasoned, and yet that Court is clearly aligned with the lower court's own opinion. "It is true that (the statute prescribes the Debtors may not invoke their powers under Section 522(f) except to offset property that is exempt under 11 U.S.C. Section 522(b)." Id. at 586. This viewpoint is shared by each of the other cases in Petitioner's "aligned grouping." See, In Re Brown, 734 F.2d at 125; Dominion Bank, 780 F.2d, citing

In Re Hall, supra, with approval, at 412; In Re Thompson, 750 F.2d at 631;[10] In Re Leonard, 866 F.2d at 337.

Petitioner's quote from In Re Hall, 752 F.2d at 587, on page 13 of his brief:

> ...To permit states to inhibit the operation of the lien-avoidance provision simply by defining all lien-encumbered property as "not exempt" would render the statute, a result inconsistent with the well-established principle of statutory construction requiring that all parts of an act be given effect, if at all possible."

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10. Petitioner's grouping of this case with those aligned with In Re Hall, 752 F.2d at 582, is probably inadvertent. In Re Thompson, 750 F.2d 628, denies the application of the avoidance statutes after a discussion of congressional intent regarding Section 522(f) and then concludes rather subjectively that the transaction before it just was "...not the sort of law value personal goods in which "adhesion contract" security interests are taken." See page 631

stands in glaring juxtaposition to the fact that the instant case did not challenge a state legislated "opt-out" provision specifically promulgated under the authority of 11 U.S.C. Section 522(b)(2) which defined all lien encumbered property as not exempt and did not involve an asset which became exempt subject to a prior existing lien.

The illogicality of Petitioner's argument is best demonstrated by a simple hypothetical scenario in which: a Debtor owns two parcels of improved property; he lives in one and enjoys a homestead exemption in it; a judgment is entered against him which is perfected against the other or second non-homestead parcel; he sells the

homestead, moves to and sets up household on that previously non-homestead property; he improves it with the proceeds of the homestead sale and then seeks the protection of the Bankruptcy Court claiming a homestead exemption on the second parcel.

Petitioner's argument would require the application of 11 U.S.C. Section 522(f) and resulting removal of the judicial lien, a result never contemplated by Congress or any of the cases which Petitioner suggests are in conflict.[11]

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11. See footnote 9, page 19, supra.

The holding of the Court below and of In Re Hall, 752 F.2d at 582, are totally consistent given the materially different factual scenarios upon which they are based. Petitioner has failed to demonstrate the existence of a conflict; that is that any court of appeals would hold any differently than the Eleventh Circuit did given that the Debtor's exemption was never held in any manner other than subject to the creditor's judicial lien. The Petitioner must not only show the existence of a clear-cut conflict among the Circuits, it must be real and embarrassing. Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955).

In this instance, it is nonexistent and the writ must be denied.

Petitioner suggests that In Re Pine, 717 F.2d at 281, and In Re McManus, 681 F.2d 353, have been ignored by some courts for the reason that they frustrate federal purpose and have ignored consideration of the supremacy clause. Those cases dealt issues arising out of the construction of state legislation promulgated under the authority of 11 U.S.C. Section 522(b) which were arguably in conflict with the purpose of 11 U.S.C. Section 522(f). The case below presents a state constitutionally defined exemption which came into being after the existence of the lien in question.

Without saying so, the Petitioner is suggesting that 11 U.S.C. Section 522(f) should preempt the Florida Constitution's prescription for homestead exemption. His only authority for such a proposition are the two cases cited in conjunction with his argument that the time of attachment of the lien does not matter: In Re Hershey, 50 B.R. 329 (S.D. Fla. 1985), and In Re Baxter, 19 B.R. 674 (Bankr. 9th Cir. 1982).

As a consequence of the opinion of the Eleventh Circuit in the case below, In Re Hershey, 50 B.R. at 329, has no precedential value. It must be assumed that if it had been appealed to the Eleventh Circuit it would have been reversed, and in any event, does not

represent the law of the Eleventh Circuit.

As for In Re Baxter, 19 B.R. at 674, the best argument that Petitioner can make is that it represents a potential conflict. He has cited no Ninth Circuit case which holds contrary to the decision below. An argument that the Ninth Circuit might so hold is hardly sufficient to invoke the standard for jurisdiction required by this Court. Rice, 349 U.S. at 70.

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons that the Petitioner has failed: (A) To cite any case which has ruled upon the applicability of 11 U.S.C. Section

522(f) under the factual setting presented by the case below; (B) To show the existence of any conflict in opinions among the courts of appeals for the circuits and certainly none which are real and embarrassing; (C) To argue the presence of any issues of gravity and general interest or (D) To propose any other basis upon which jurisdiction under 28 U.S.C. Section 1254(1) might exist.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. MAIL to: ISIDORE KIRSHENBAUM, ESQ., 1900 Main Street, Suite 214, Sarasota, Florida 34236, this 8th day of April, 1990.

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